No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

CHET L. PARKER and LOIS M. PARKER,

Appellants,

vs.

TITLE AND TRUST COMPANY, a corporation, PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,

Appellees.

and

WALTER STEGMANN,

Appellant,

vs.

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Appellees.

BRIEF OF APPELLEE TITLE AND TRUST COMPANY, a corporation

On Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, Judge.

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On Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, Judge.

STATEMENT OF THE CASE

This appeal is taken from a judgment (R. 146-149) which decreed that certain policies of title insurance issued by this appellee (hereinafter called "Title and Trust" or "the title company") to appellant, Chet L. Parker, be cancelled and set aside upon tender back of the premiums paid. Appellants' counterclaim for recovery on the policies was dismissed with prejudice.

By agreement of the parties this action came on for trial by the court sitting without a jury (R. 146). A stipulation of admitted facts was entered prior to trial (R. 97-105). Forty-five witnesses testified orally at the trial and numerous exhibits were received in evidence.

The trial court's opinion states clearly the basis for its decision in favor of Title and Trust. Therein the court declared that the testimony of the Parkers and Stegmann "was shown to be false in many particulars and, when not actually controverted, was highly improbable and, at times, fantastic." (R. 107). Further the court stated ". . . in practically every instance I have come to the conclusion that the testimony of the Parkers and Stegmann was false." (R. 109).

Comprehensive findings of fact and conclusions of law which were thereafter entered (R. 119-145) reflect the court's appraisal of the credibility of the Parkers and Stegmann, and the rejection of their testimony as "false," "highly improbable" and "fantastic." Likewise, the findings reflect the court's belief in and acceptance of the testimony of other witnesses, particularly Paul Winans, Claude Parrott, Joyce Petersen, Retlaw Haynes and Lawrence Bogar, the last four having no interest whatsoever in the controversy.

SUMMARY OF ARGUMENT

1. Under Rule 52 (a) of the Federal Rules of Civil Procedure the scope of review of factual matters is limited to a determination of whether any finding of fact was clearly erroneous.

2. There was ample evidence to support the findings that appellants, knowing of the fatal flaw in the title to the property involved, and knowing that appellee had overlooked the flaw, conspired to defraud appellee by obtaining a title insurance policy in excess of the amount paid for the property, misrepresenting their loss and collecting a profit from the title company.

3. Appellants Parker were under a legal obligation to deal with the title company in the utmost good faith. When they learned that the title company had failed to discover the defect of which they had knowledge, they were under a legal duty to disclose the information which they had and their failure to do so constituted actionable fraud. The title company had a right to rely and did rely on the assumption that appellants were acting in good faith. Any negligence on its part would not bar its right to rescind the contract on the ground of fraud and unilateral mistake known to the appellants.

4. No prejudicial error was committed by the court in admitting evidence of other transactions between Parkers and Stegmann. Such evidence was competent and relevant to prove the relationship between the parties and the motive and intent with which various acts were performed.

5. The failure of appellants Parker to notify appellee of the defect in title constituted a breach of the policy conditions and precludes recovery on the policy. Although it was unnecessary to show that breach of the conditions had been prejudicial, the evidence showed and the trial court found that it was unreasonable and materially prejudicial to the title company.

6. Appellant Stegmann was a proper party defendant and declaratory relief was properly granted as to him. The fact that liability on his part was contingent on what the court might find on certain basic issues in the case did not preclude maintaining the action against him.

ARGUMENT

The Limited Scope of the Court's Review

In their specification of errors, appellants complain of error with respect to over twenty separate findings of fact made by the trial court (App. Br. pp. 6-8). When the errors complained of are analyzed, it becomes crystal clear that appellants' sole complaint is that the trial court believed the testimony given by appellee's witnesses and rejected the version given by the Parkers and Stegmann.

Rule 52 (a) of the Federal Rules of Civil Procedure states in part:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity to the trial court to judge the credibility of the witnesses."

In interpreting Rule 52 (a) the United States Supreme Court has ruled that it is within the exclusive province of the district courts to appraise the credibility of the witnesses (*United States v. Oregon State Medical Society,* 343 U.S. 326, 339, 72 S. Ct. 690, 96 L. Ed. 978; *Walling v. General Industries Co.,* 330 U.S. 545, 67 S. Ct. 883, 91 L. Ed. 1088.) Numerous decisions of this court have followed the settled doctrine that findings which depend upon the credibility of oral testimony will be regarded as conclusive on appeal. (*Wittmayer v. United States,* 118 F. (2d) 808 (CA 9); *Grace Brothers v. Commissioner,* 173 F. (2d) 170 (CA 9); *Ruud v. American Packing & Provision Co.,* 177 F. (2d) 538, 541 (CA 9); *Overman v. Loesser,* 205 F. (2d) 521, 524 (CA 9), cert. den. 346 U.S. 910, 74 S. Ct. 241, 98 L. Ed. 156. The rule giving finality to findings drawn from an appraisal of oral testimony is particularly applicable to a case such as the one at bar, where intent, design and motive play such a large part. In *Earle v. W. J. Jones & Son,* 200 F. (2d) 846, 848, this court quoted the following from *United States v. Yellow Cab Co.,* 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."

THE SCHEME TO DEFRAUD

It is our view that Rule 52 (a) is determinative of all fact questions raised on this appeal, for appellants have not pointed out wherein any finding was clearly erroneous. Appellants' argument on the facts is misleading because they have selected only *some* of the evidence on *some* of the facts and have discussed it out of context with other pertinent facts. The evidence upon which they rely is primarily the testimony of the Parkers and Stegmann, which was found to be false. While it may seem fantastic that anyone would pay out nearly $100,-000 in pursuance of a fraudulent scheme, we believe that no one can read the record in this case without becoming convinced that this is precisely what happened; and, moreover, that it was a scheme cleverly devised, played for high stakes, with no apparent risk, and missed success by a whisker.

Like most cases of conspiracy to defraud, no adequate appraisal can be made here of the weight or meaning to be attributed to isolated acts or statements of the conspirators. Reviewed, however, within the framework of other facts established by competent evidence, the meaning becomes clear and unmistakable and the acts in question fall into their proper place within the fraudulent scheme. It may be of assistance to the court, therefore, to set forth at the outset of this brief at least an outline of what we believe, and what the court found to be the fraudulent scheme. Other pertinent facts will be mentioned during the course of the argument.

The property involved in this case is situated on the shores of Lost Lake in Hood River County, Oregon. The nature of this property can best be understood by the editorial appearing in a Hood River newspaper after Parkers had acquired the property and it became known that this property, so highly esteemed for its recreational use, was to be exploited for its timber values (Ex. 15-A, R. 1925). The property consisted of Lot 1, comprising about 26 acres, which was owned in fee by the Winans family, and Lot 2, comprising 40 acres adjoining. While the Winans family had asserted claim to Lot 2 for many years, they were well acquainted with the fact that the title thereto was fatally defective and that an Act of Congress would be necessary to obtain title. They had in fact, some years before, collected a substantial amount from another title insurance company because of the unmarketability of the title to Lot 2. The Winans had a sentimental attachment for Lot 1 and regarded it as having a large potential value for resort and residential property.

In July, 1951, appellant Stegmann, who had long acted as agent and "front man" for the Parkers in buying and selling timber and finding "deals," learned of the Winans' property. Masquerading as a wealthy stockman looking for a private retreat on which to build a family home, Stegmann approached Paul Winans and expressed a desire to purchase the property on the lake shore. Winans explained the title difficulty on the forty-acre tract and that for this reason he could not sell it, but stated that they might be willing to sell Lot 1 for $80,000, reserving, however, some lots for family use along the lake shore. He also explained that he had previously collected $3000.00 on a title insurance policy because of the unmarketability of title to Lot 2. When Stegmann insisted on buying Lot 2 as well, in order to prevent someone else from cutting the timber and spoiling his private retreat, Winans agreed that the family would include whatever interest it had in Lot 2 for an additional price of $20,000.

After conferring with Parker, Stegmann took an option in his name to buy both tracts for a purchase price of $100,000. The interest of the Parkers in the transaction was not revealed and Stegmann made a $1,000 payment on the option by his personal check on a McMinnville bank. Stegmann was in fact insolvent, had no bank account anywhere, and this check was, by arrangement of the Parkers with their bank, charged to the Parkers' bank account.

On August 13, Chet Parker ordered a title report from appellee. He and Stegmann then visited the property and called on forest service officials to inquire about the title.

On August 16, Parker obtained the title report and learned that Title and Trust had made the same error as the previous title company. It was now apparent that a large amount of money could be made by a "deal" on the property at the expense of the title company. It was at this point that the major details of the plan to defraud were devised. The essentials of the scheme were:

1. They must acquire title to the property.

2. They must in some manner inflate the apparent investment so that they could collect more from the title company than they had paid for the property.

3. They must continue to conceal Stegmann's agency in order to insulate Parker from the knowledge which Winans had imparted to Stegmann concerning the title and also to facilitate their scheme to inflate the apparent loss resulting from the defect in title.

Phases 1 and 3 were accomplished by having Stegmann pay the balance due on the property and close the deal with the Winans. The balance paid when the deed was delivered was $95,000, but a refund check of $4750 was given by the Winans in payment for the reserved area, thus reducing the final payment to a net of $90,250.00. During these negotiations Parkers' interest was carefully concealed, the deed was taken with the grantee's name in blank and the Winans family did not even know that Parkers were the purchasers until after the deed had been recorded. Even Abraham, the attorney employed by appellants to close the deal, was led to believe that Stegmann was the buyer and did not learn that he represented Parkers until he delivered the deed (R. 932, 935, 938, 939, 940).

Phase 2, the inflation of the apparent loss suffered when the flaw should be discovered, was attempted by two means. The Parkers attempted to sell the property to Multnomah Plywood Corporation for $180,000, in order to show a substantial loss of profit. In addition, a document was drawn up by which Stegmann purported to assign the option to Parkers for $25,000. To aid in the deceit this document recited that Lot 2 was valued at $90,000, thus boosting its apparent value from the $20,000 discussed between Stegmann and Winans.

The Parkers then executed a check for $25,000 payable to Stegmann, which they *deposited* in their own bank account. In this manner they acquired a cancelled check apparently proving that they had paid Stegmann $25,000 for the option.

Before closing the transaction with Winans and paying the balance of the purchase price Parker delivered the spurious assignment to Title and Trust Company and obtained a purchaser's policy in the amount of $125,000. This was exchanged for an owner's policy after the deed had been recorded. The title company discovered its mistake shortly before issuance of the owner's policy, but believing the Parkers to have been innocent of any wrong, it issued the owner's policy without any additional consideration in accordance with its previous agreement (R. 176, 196, 197).

Negotiations then commenced for a settlement on the title policy. The Parkers represented their loss to be $120,300. The company was willing to pay this amount and tendered a contract to that effect (Ex. 9). However, the contract would have required the Parkers to cooperate in a suit to rescind and to recover the purchase price from Stegmann and Winans. The Parkers refused to authorize a suit against Stegmann and ultimately the title company became suspicious of the relations between the Parkers and Stegmann. Inquiry at Hood River also disclosed information indicating that the Parkers and Stegmann had known from the beginning of the title flaw. The company therefore instituted this action for a declaration of rights and cancellation of the policies.

In depositions before trial Stegmann insisted that he had cashed the $25,000 check, but became hopelessly involved in trying to explain how he had spent the money (R. 1939-1946). When the depositions were resumed after several weeks recess Stegmann completely changed his story, said he had returned the check to the Parkers to apply on a loan of $22,000 which he claimed the Parkers had made to him in November of 1950 (R. 1946-1949). This transaction was also verified by the Parkers. When asked for documentary proof of such a loan, the Parkers produced a note and a mortgage, unrecorded, on personal property which probably was nonexistent. They told a fantastic story of having obtained the money from their safety deposit box which they turned over to Stegmann in cash. They evaded efforts to check on their story through safety deposit entry records by the story that they had for some time kept the money in a commode in their home in anticipation of such a loan.

Stegmann, attempting to support the story, floundered badly and was unable to explain what had been done with the proceeds of the alleged loan. The testimony of the Parkers and Stegmann concerning this loan and concerning the $25,000 check was obviously and flagrantly false. With the demise of this story it became evident, of course, that Stegmann had acted throughout as agent for undisclosed principals, the Parkers.

Knowledge of Parkers and Stegmann Concerning the Flaw in Title:

Appellants contend that they did not know of the flaw in the title and that the finding concerning such knowledge is not supported by substantial evidence. Further, they contend that at most they knew merely of a technical defect. They admit, indeed assert, that Paul Winans knew in intimate detail the nature of the flaw, but deny that there was evidence that such information was imparted to them. On pages 16-20 of appellants Parkers' brief they set forth what they claim to be all of the evidence showing the nature of the knowledge which the Parkers had concerning the defect. This statement is incomplete and inaccurate.

The testimony was that the Winans regarded their family's interest in Lot 2 as a mere "equity", arising from the fact that they had held the property and paid taxes on it for many years (R. 862). From the very beginning Paul Winans told Stegmann all about the nature of the flaw and the fact that title could not be obtained except through an Act of Congress (R. 797, 802); that the family did not own title to all of the property and that forty acres of it was not in a condition to offer for sale (R. 797); that he had collected substantial damages from a title company because of the unmarketability of the title to Lot 2 (R. 798). On August 31, he gave this same information to the appellant Parker, who had been introduced to him as a surveyor, even mentioning the Supreme Court decision which rendered the title invalid, and that he had employed an attorney to attempt to get a private bill through Congress (R. 830-833).

Before the balance of the purchase price was paid and the deed delivered Winans again referred to the flaw in title in conversation with Stegmann and requested that he sign a document reciting that the conveyance was subject "to any and all alleged claim or claims of the United States Government" which Stegmann refused to sign because "it would be the same as admitting that I know the title to that forty acres is no good" (R. 841, 914, 1716, 1717).

Again, when the deed was delivered and the balance of the purchase price paid, Winans and his attorney, Vawter Parker, informed appellants Parkers' attorney, Kenneth Abraham, of the title situation and suggested that it would be easier to get Congressional action if the deed were not recorded and application made in the name of Winans (R. 847, 943). Mr. Abraham did not, as stated by appellants, tell Mrs. Parker that there was nothing to worry about. To the contrary, he was concerned about the information (R. 962) and related it to Mrs. Parker, but she replied that she was satisfied with the title (R. 947, 948, 959).

The knowledge of the appellants concerning the flaw in title is also shown circumstantially by the fact that Parker ordered a title report before he had even seen the property and before he claims to have taken the assignment of option. On the same day he and Stegmann examined the property, Lot 2 of which was posted with signs advising that it was part of the Bull Run Water shed of the Mt. Hood National Forest (R. 1052).

On the same day Parker and Stegmann called at the forest ranger station and inquired about the title to the property as well as the signs above mentioned. When told that the ownership of Lot 2 was in question, Parker suggested that the way to find out whether the Government owned the timber was to cut down a tree (R. 1050, 1051, 1068).

It is true that appellants denied having received such information, but the trial court found their testimony in this regard to be false and unworthy of belief. It is thus apparent that there was ample and sufficient evidence upon which the court could base its finding that appellants not only knew of the defect in title, but that they had accurate and complete information concerning the nature and serious character of the flaw. Any argument to the contrary involves weighing the credibility of witnesses and accepting appellants' testimony rather than that of other witnesses.

Legal Obligation to Title Company of Applicant for Title Insurance:

The legal question thus presented is whether a person possessed of such knowledge concerning a serious flaw in the title to real property and knowing that the title company has failed to detect the flaw, is under any obligation to advise the title company of its mistake. Preliminary to a discussion of this legal question it will be well to point out certain inaccuracies in appellants' factual statement and certain points which distinguish this case from the ordinary situation involving title insurance:

1. As pointed out above, the knowledge which appellants had was not, as suggested, of a mere technical defect or a mere rumor of an unsubstantial defect, but was positive, unequivocal and corroborated information as to a defect so serious as to amount to a failure of title.

2. Appellants knew that the property was claimed by the United States as part of a national timber reserve and that it was located in the heart of a recreational area; and, therefore, that the chance of obtaining a grant from Congress for the purpose of logging the timber was virtually nonexistent.

3. The suggestion that appellants were uneducated laymen and therefore presumably unable to comprehend the seriousness of the title flaw is without foundation in fact. Some of our most successful confidence men can boast of little in the way of formal education. The shrewdness of the Parkers in business transactions is demonstrated by their income tax returns (Ex. 49-54; R. 2124-2161). Parker estimated that he invested from $100,000 to $125,000 each year in timber for resale and that he had engaged in approximately fifty of such transactions, in half of which he had obtained title insurance and in the other half abstracts of title (R. 273, 275). He even professed to know that a school land title would fail if it had not been completely surveyed;

and that he always carried a map and checked on whether or not a school land section had been surveyed (R. 1807). The Parkers had also had considerable experience in collecting substantial losses from insurance companies (R. 2187, 2195, 2129, 2141).

4. This is not, as suggested, a case of property purchased in good faith in reliance upon a title company's assurance as to title. The purchase of a title policy here did not have the usual purpose of protecting from an unexpected contingency. What ordinarily would be a contingency was here a certainty and the only purpose of the policy was to give appellants a fund from which to realize a fraudulent profit. Discussion of the legal question, therefore, should not be clouded by consideration of what appellants' duties were before they discovered that the title company had missed the flaw, or what their duties would have been had their knowledge been confined to unsubstantial rumors of a title defect, or even what the duties would have been if they had been induced by the title company's opinion to believe the title to be valid. Under the facts as found by the court and supported by substantial evidence none of these fact situations is present here.

The legal question, therefore, may be restated to be: Will a person who knows that the thing which he seeks to insure is nonexistent and who, therefore, purchases insurance not to protect against an unexpected contingency but for the express purpose of realizing a profit by collecting on the policy, be permitted to capitalize on a mistake of the insurance company, whether or not negligent? We believe it evident that to sustain this proposition the courts would be lending their aid to the enforcement of a fraudulent scheme. Appellants have cited no cases, and we doubt whether any exist, supporting any such doctrine.

Appellants apparently assert that the parties in this matter were dealing at arms' length, that they must look out for themselves, and that mere silence is not fraud (App. Br. pp. 24-25). They concede, however, that there are cases where no affirmative representation is required, these being cases where there exists a duty to disclose.

First of all, under Oregon law appellants and appellee were not dealing at arm's length. The Supreme Court of Oregon has held that a contract guaranteeing a title is one of insurance rather than suretyship, so that it is governed by the rules applicable to other insurance contracts (*DeCarli v. O'Brien,* 150 Or. 35, 41 P. (2d) 411).

The rule announced by the late Chief Justice Stone in *Stipcich v. Metropolitan Life Ins. Co.,* 277 U.S. 512, 48 S. Ct. 512, 72 L. Ed. 895, is representative of the Oregon law. That case originated in the Circuit Court for Clatsop County, Oregon and was removed to the United States District Court. The plaintiff sued to recover the proceeds of a life insurance policy. The company's principal defense was that the insured, after applying for the policy and before delivery of the insurance and payment of the first premium, had suffered a recurrence of a duodenal ulcer which later caused his death, and that he failed to reveal this information to the company. At trial, a verdict was directed for the company (8 F. (2d) 285) on the ground of the failure of the insured to disclose.

The case was reviewed by the United States Supreme Court on certified questions of law, and the judgment was reversed on the ground that the trial court had erred in excluding evidence of a disclosure made by the insured to an agent of the company. However, the rule requiring disclosure was succinctly stated:

> "Insurance policies are traditionally contracts uberrimae fidei and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. Carter v. Boehm, 3 Burrows, 1905; Livingston v. Maryland Insurance Co., 6 Cranch, 274, 3 L. Ed. 222; McLanahan v. Universal Insurance Co., 1 Pet. 170, 7 L. Ed. 98; Phoenix Life Insurance Co. v. Raddin, 120 U.S. 183, 189, 7 S. Ct. 500 (30 L. Ed. 644); Hardman v. Firemen's Insurance Co. (C.C.) 20 F. 594."

The term "uberrimae fidei" is defined as follows in Black's Law Dictionary (4th Ed.) p. 1690:

> "The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight. A phrase used to express the perfect good faith, concealing nothing, with which a contract must be made; for example in the case of insurance, the insured must observe the most perfect good faith towards the insurer."

The special character of insurance contracts as uberrimae fidei thus distinguishes virtually all of the cases cited by appellants. They are, for the most part, cases dealing with arm's length transactions, where the rule of caveat emptor and analogous rules have been applied. However, even in arm's length transactions, the duty to disclose frequently arises.

The doctrine of nondisclosure, as a species of fraud, is well summarized in the American Law Institute's Restatement of the Law of Restitution, § 8, Comment (b), p. 33:

> "Non-disclosure is a failure to reveal facts. It may exist where there is neither representation or concealment. Except in a few special types of transaction such as insurance contracts and transactions between a fiduciary and his beneficiary, there is no general duty upon a party to a transaction to disclose facts to the other party. However a person who stands in a fiduciary or confidential relationship to the other party has a duty to reveal all relevant facts (see Restatement of Agency, § 390, Restatement of Trusts, § 170 (2)). *Likewise, a person who, before a transaction is completed, knows or suspects that the other is acting under a misapprehension which, if the mistake were mutual, would cause the transaction to be voidable, is under a duty to disclose the facts to the other.* * * *
>
> *"Where the parties contract on the basis that there is a risk of happening of an event or the existence of a condition which would make the subject matter more valuable, or less valuable, and one of them has knowledge that the event has happened, or that the condition exists, it is fraudulent non-disclosure for him to fail to reveal this fact to the other party."* (Emphasis supplied)

In the instant case, the court has found as a fact that after being apprised of appellee's failure to learn of the government's claim to Lot 2, appellants entered into a conspiracy to defraud appellee by inducing appellee to issue to the Parkers a policy of title insurance, and to collect the amount of such insurance on account of the failure of title. The findings further state that pursuant to and in furtherance of this conspiracy the Parkers falsely represented to the title company that they had paid $25,000 for the option on the property, that the value of Lot 1 was $35,000 and Lot 2 was $90,000, and wilfully and intentionally concealed and failed to disclose their knowledge of the defect, knowing that appellee had failed to discover the defect; and that it would issue the policy in ignorance thereof and in reliance upon the apparent good faith of the Parkers (R. 136-138).

Thus the failure to disclose was a deliberate withholding of information which they knew appellee did not have, and was done for the purpose of deceiving and defrauding appellee. It was only one of many acts which appellants Parker and Stegmann undertook to accomplish their fraudulent scheme, and would fall squarely within the rule above quoted, even if the parties had been dealing at arm's length.

In this connection we call the court's attention to the recent Oregon case of *Musgrave v. Lucas,* 193 Or. 401, 238 P. (2d) 780. This was an action by the vendees against vendors to recover damages on account of fraud in the sale of a sand and gravel business adjacent to a navigable river. The complaint, to which a demurrer was sustained by the lower court, alleged in substance that the defendants had concealed the fact that they had no permit from the Government to dredge gravel and sand from the river and had been notified by the

Corps. of Engineers that further removal of sand and gravel in that area would not be allowed. In reversing the judgment and holding the complaint to be invulnerable to attack by demurrer, the Oregon Supreme Court ruled (p. 410):

> "Actionable fraud may be committed by a concealment of material facts as well as by affirmative and positive misrepresentations. In 37 CJS, Fraud, 244 § 16 a., it is said:
>
> > 'An exception to the rule that mere silence is not fraud exists where the circumstances impose on a person a duty to speak and he deliberately remains silent. It is well settled that the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation. Where the law imposes a duty on one party to disclose all material facts known to him and not known to the other, silence or concealment in violation of this duty with intent to deceive will amount to fraud as being a deliberate suppression of the truth and equivalent to the assertion of a falsehood.' "

This case cannot be distinguished, as appellants would do, on the ground that the facts concealed were not available to the other party. The statute required a permit to dredge in the river and its existence or nonexistence was readily available from Government records. Yet the duty to disclose was found to exist although the contract was one where the parties dealt at arm's length.

Of course there is even greater reason to apply the rule in insurance cases where the relation requires the utmost good faith. In *Arthur v. Palatine Insurance*

Company, 35 Or. 27, 57 P. 62, suit was commenced to recover upon a policy of fire insurance. Part of the real property was encumbered by mechanics' liens and the personal property by a chattel mortgage. The policy provided, in part, that it would be void if "the subject of insurance be personal property, and be or become uncumbered by a chattel mortgage," and "if the insured had concealed, or misrepresented, in writing or otherwise, any material fact or condition . . ." The insurer claimed that the policy was void because the liens and encumbrances were material to the risk and were concealed by the insured, and because it had no knowledge of the chattel mortgage.

A jury verdict for plaintiff was affirmed on appeal and the court in its opinion discussed the correctness of the trial court's charge. The trial court had charged the jury that the failure of the assured to inform the defendant of liens and encumbrances would not render the policy void *unless it was intentional and with the design to defraud.* The instructions were approved in a well-written opinion by Chief Justice Bean. In the case at bar the court's findings do affirmatively establish an intentional failure on the part of the appellants to advise appellee of the defect in Lot 2, for the purpose of perpetrating a fraud.

A New York decision which aptly illustrates the principle of fraudulent nondisclosure in connection with the issuance of a title policy is *Vaughn v. United States Title Guaranty & Indemnity Co.,* 137 App. Div. 623, 122 N.Y.S. 393 (App. Div. 1st). In that case plaintiff employed an attorney to get a deed for him covering some property owned by one, Maria Hanley, whose whereabouts were unknown. The attorney delivered to the plaintiff an instrument purporting to be such a deed and applied for a policy of title insurance on plaintiff's behalf. A few months later a condemnation suit was instituted against the property and it was adjudicated that the deed vested no title in the plaintiff. He then sued the title company and a verdict was directed in his favor by the trial court.

On appeal, the Appellate Division reversed on the ground that the defendant should have been allowed to go to the jury on the question whether plaintiff had fraudulently concealed facts tending to show that he did not have good title. The court said (122 N.Y.S., p. 394):

> "The inference is almost irresistible that, when the plaintiff applied for the insurance, he had knowledge of all the facts upon which it was adjudicated in the condemnation proceedings that he did not have title. He asks to recover in this action upon the ground that a deed, procured by his agent, was a forgery. It is not difficult to infer that said deed was procured in anticipation of the condemnation proceedings, and it is certain that the contract of insurance in suit was obtained because the plaintiff knew that there was at least doubt of the validity of his deed. The defendant, upon issuing the title insurance, naturally assumed that the plaintiff's deed was genuine, and the concealment of facts within the plaintiff's knowledge, tending to show that it was not, was as fraudulent as affirmative misstatements. The plaintiff's conduct was equivalent to a representation that, so far as he knew, the deed presented by him was genuine."

On the other hand, appellants seem to consider important a New York Court of Appeals case entitled *Empire Development Co. v. Title Guarantee & Trust,* 225 N.Y. 53, 121 N.E. 468 (App. Br. pp. 34-35). That case involved no element of fraud. Both contracting parties were aware of the encumbrance involved and the question concerned coverage of the policy. The language quoted by appellants demonstrates the difference in the fact situations there and here:

> "To a layman, a search is a mystery, and the various pitfalls that may beset his title are dreaded, but unknown. To avoid a possible claim against him, to obviate the need and expense of professional advice, and the uncertainty that sometimes results even after it has been obtained, is the very purpose for which the owner seeks insurance."

No doubt this statement is usually true in title insurance matters. But Parkers' purpose was neither to avoid possible claims (which they knew were inevitable) or to obviate the need for professional advice (which would have been worthless to the purpose which they had in mind). Unlike the usual situation, they bought the insurance not to guard against an unexpected contingency but to make a profit off of the title company.

The foregoing serves to distinguish all of the authorities cited by appellants on the question of fraudulent concealment. In none of them was there a finding supported by evidence that the purchase of insurance was attended with knowledge and concealment of material facts with intention to defraud.

RELIANCE

Appellants next contend that fraud was not proven because appellee had no right to rely and did not rely upon their failure to disclose the facts surrounding the government's claim to Lot 2. They urge that appellee made its own investigation of the records and relied exclusively on its own search.

Appellants' assertion that there was no right to rely on the Parkers' silence concerning the title defect is not supported by any authority. The cases which they cite involved fact situations where there was no duty to disclose, which is not this case. Every duty to another carries with it, as a necessary corollary, the right of such other party to assume that it will be performed. If this were not so, there could be no such thing as fraudulent concealment, for it would never be possible to show reliance on anything more than the failure to disclose.

Contrary to appellants' contention that there was in fact no reliance, the trial court found that appellee had relied not only upon the examination which it made of its own records and the public records of the State of Oregon, but also upon the apparent good faith of the Parkers and its belief that the Parkers knew of no fact or circumstance which would impair the title to the property (R. 138).

While it may be true that a title company does not rely primarily upon the customer to tell it about title defects, it always relies, as does every insurance carrier, on the good faith of its customers. This means that it is entitled to and does assume that the customer honestly wants assurance that his title is good and wants the policy only as indemnity against unknown contingencies; that he in good faith hopes to own specific property and is not seeking merely a means of making a profit by virtue of an error which he knows the title company has made.

In the instant case the appellants owed an affirmative duty to disclose to appellee the serious title defect, of which they had full knowledge, because it went to the very essence of the risk which appellee contracted to insure. The fault here is that they remained silent with the knowledge that appellee had failed to find the fatal flaw in the title; that it would not issue the policy if the government's claim to Lot 2 were disclosed; and with the intention of making a profit from the error. Here lies the so-called intent to deceive; the inducement of action through nondisclosure is the fraud. The action taken by appellee in issuing the insurance was in reliance upon the failure to disclose and the illusion thus created by appellants that they knew of no fact which would render the transaction other than regular in all respects.

Of course, appellee is not precluded from relief because it conducted an investigation of the public records, a search which did not reveal the defect in title and which was completed before appellants framed their fraudulent scheme. It is a rule of universal application that it is not necessary to the predication of fraud that a misrepresentation be the sole cause or inducement of the contract or transaction, and the only element relied upon. It is enough that it may constitute a material inducement (23 Am. Jur. § 145, p. 946 (collecting cases).) The American Law Institute's Restatement of the Law of Torts (Vol. 3, § 546, comment a) states:

> "It is not necessary that the other's reliance upon the credibility of the fraudulent misrepresentation be the sole or even the predominant factor in influencing his conduct; it is enough that he would not have acted or failed to act as he did had he not relied upon a misrepresentation as true or probably true."

Of course the rule is no less true where the fraud consists of fraudulent concealment rather than affirmative misrepresentation. As stated in *Vaughan v. United States Title Guaranty & Indemnity Co.*, supra, and *Musgrove v. Lucas*, supra, concealment where there is a duty to speak is equivalent to an affirmative misrepresentation.

With respect to independent investigations by insurers as lessening the right to avoid the policy for fraud, the textwriters of American Jurisprudence lay down the following rule (29 Am. Jur. (Cum. Supp.) § 543.5, p. 63):

> "The few cases in which the question was squarely before the court support the rule that an independent investigation by the insurer does not in itself lessen the right of the insurer to avoid the policy because of misrepresentations made by the insured in his application, except where the independent investigation either discloses the falsity of the representations or discloses facts which place upon the insurer the duty of further inquiry."

In the instant case the evidence is uncontradicted that the independent investigation did not disclose the flaw in the title.

Appellants contend, however, that since the flaw could have been discovered, appellee's negligence will preclude it from preventing the perpetration of the fraud. Whatever might be the rule of early cases relied upon by appellants, the Oregon Supreme Court in *Larsen v. Lootens,* 102 Or. 579, 591, 194 P. 699, 203 P. 621, first noted the evolution of the law in the direction of punishing defrauders rather than their negligent victims. In that case, the court stated (pp. 591-592):

> "The books teem with decisions respecting the effect of an independent investigation by the purchaser, upon the weight to be attached to false representations by the vendor. The earlier decisions held the purchaser to a very strict rule in such case, apparently upon the theory that in the long run it was better public policy to discourage negligence and carelessness than to punish fraud. Concerning this attitude of the early courts and the progress made to a more equitable rule, a recent work remarks:
>
>> " 'The policy of the courts is, on the one hand, to suppress fraud, and, on the other, not to encourage negligence and inattention to one's own interests. The rule of law is one of policy. Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has obvious dangers. But judicial experience exemplifies that the former is the less objectionable, and hampers less the administration of pure justice. The law is not designed to protect the vigilant, or tolerably vigilant, alone, although it rather favors them, but is intended as a protection to even the foolishly credulous, as against the machinations of the designedly

> wicked. The courts, however, are not entirely in accord as to the circumstances under which fraudulent representations may be relied on, although it cannot perhaps be denied that negligence as a defense in cases of fraud has been in danger of being pushed too far. There would seem to be no doubt that while, in the ordinary business transactions of life, men are expected to exercise reasonable prudence, and not to rely upon others, with whom they deal, to care for and protect their interests, this requirement is not to be carried so far that the law shall ignore or protect positive, intentional fraud successfully practiced upon the simple minded or unwary.' "

In *J. C. Corbin Co. v. Preston,* 109 Or. 230, 249, 212 P. 541, 218 P. 917, the court enunciated the rule that one who misrepresents will not be permitted to say to his defrauded vendee, "You were yourself guilty of negligence." In *Paulson v. Kenney,* 110 Or. 688, 224 P. 634, the court remarked that it was a poor answer to a charge of fraud for the wrongdoer to urge that the person defrauded should have watched more closely to avoid being the victim of his trickery (see also *Outcault Advertising Co. v. Jones,* 119 Or. 214, 234 P. 269, 239 P. 1113, and *Horner v. Wagy,* 173 Or. 441, 463, 146 P. (2d) 92, quoting from *J. C. Corbin Co. v. Preston* (supra).)

UNILATERAL MISTAKE KNOWN TO APPELLANTS

As mentioned above, the authorities cited by appellants to show that appellee had no right to rely on appellants' silence are cases involving arm's length transactions, such as sales of property, construction contracts and employment contracts, where the rule of caveat emptor and similar rules were invoked. Of course, these cases are not relevant in an action such as this where the parties are required to deal with each other in utmost good faith. However, even in arm's length transactions, as we have seen, rigid common-law rules are relaxed and the duty to disclose arises when one party discovers that the other is acting in ignorance of material facts. Restatement of the Law of Restitution, § 8, Comment (b), p. 33; *Musgrave et al. v. Lucas et al.,* 193 Or. 401, 238 P. (2d) 780.

Additional examples are found in other cases where equity has granted relief against parties who knew and sought to take unconscionable advantage of the other party's inadvertent error. Although the same result has been achieved, the courts in these cases have not found it necessary to search for elements of fraud. Thus, in *Rushlight Co. v. City of Portland,* 189 Or. 194, 219 P. (2d) 732, a contractor, by mistake, submitted an abnormally low bid which the city accepted although it had ample reason to suspect the error. Affirming judgment for the contractor, the court said:

> "We believe that in this State an offer and an acceptance are deemed to effect a meeting of the

> minds, even though the offeror made a material mistake in compiling his offer, provided the acceptor was not aware of the mistake and had no reason to suspect it. But if the ofleree knew of the mistake, and if it was basic, or if the circumstances were such that he, as a reasonable man, should have inferred that a basic mistake was made, a meeting of the minds does not occur. The circumstances which should arouse the suspicions of the fair-minded offeree are many, as stated in § 94 of Williston on Contracts, Rev. Ed.: '* * * And the same principle is applicable in any case where the offeree should know that the terms of the offer are unintended or misunderstood by the offeror. The offeree will not be permitted to snap up an offer that is too good to be true; no contract based on such an offer can then be enforced by the acceptor.' "

This court in *United States v. Jones,* 176 F. (2d) 278, 285, a case originating in Oregon but controlled by federal law, noted the modern tendency to recognize unilateral mistake as a ground of rescission and cited such authorities as Williston on Contracts, Section 503 of the Restatement of the Law on Contracts, and Section 12 of the Restatement of the Law of Restitution, all of which were discussed and followed by the Oregon Supreme Court in the later *Rushlight* case.

Like the fraud cases above cited, mere negligence is no defense to the application of this rule. In the *Rushlight* case, the plaintiff was a large general contractor. In submitting a written bid on a sewer disposal project, the computation of the reinforcing steel required in the plans and specifications was omitted. This was a $100,000 item which aggregated over 15 per cent of the correct bid. Yet, even such a gross error was not deemed to bar relief, the court saying in that regard (189 Or. at p. 205):

> "One who considers in the cloistered calm of appellate chambers the mistake which the plaintiff made is prone to indict. Tranquil repose magnifies mistakes made by those who work under stress and strain. It is even inclined to condemn alacrity and insist upon such methodical care that error will be virtually eliminated. Courts, however, cannot create a Utopia and must deal with the realities of life."

The rule that negligence is not a defense is stated in the Restatement of the Law of Restitution, Section 59, as follows:

> "A person who has conferred a benefit upon auother by mistake is not precluded from maintaining an action for restitution by the fact that the mistake was due to his lack of care."

This authority was quoted with approval by the Oregon Supreme Court in *Holzmeyer v. Van Doren,* 172 Or. 176, 139 P. (2d) 778, in which the court said:

> "Some mistakes prejudice no one except those who commit them, and, therefore, cancellation will prejudice no one. In such a case a considerable degree of carelessness can be tolerated."

This principle was reaffirmed in *Edwards Farms v. Smith Canning & Freezing Co.,* 197 Or. 57, 251 P. (2d) 133, where the court said:

> "It is true that gross negligence in some cases will preclude the relief of reformation, but this is not always so, for, as stated in *Holzmeyer v. Van Doren,* 172 Or. 176, 189, 139 P. 2d 778, a universal formula cannot be adopted which will define the degree of carelessness which would bar a party from the right to seek equitable relief."

It is obvious, of course, that appellants were not prejudiced by the mistakes of appellee, for they knew the facts and could readily have corrected the error. It is likewise obvious that however the mistake may be characterized, it certainly was not gross negligence. The official real property records of Hood River County disclosed a perfect chain of title from the State of Oregon to Winans and there was no record of the title defect in that county (F. VIII, R. 122). As conceded by counsel for appellants, the legal point establishing the flaw in title was obscure and "probably very few lawyers cognizant in the general rules regarding school lands would, upon examination of the abstract in evidence (Ex. 315; R. 1899, 2266-8), have failed to pass the title" (App. Br. p. 21).

The necessary elements of this rule—mistake by one party and knowledge by the other—are present here. The fact that appellants thereafter paid the balance of the purchase price does not alter the application of the rule, for they did so with knowledge of the mistake. Under these circumstances, the rule announced by Professor Corbin in his new treatise (3 Corbin on Contracts, § 606, p. 412, note 3) is directly applicable:

> "A change of position does not prevent rescission or reformation for mistake if it occurred with full knowledge of the mistake on the part of the defendant. Taking advantage of the mistake after it was made is as bad as not preventing the mistake when it occurred."

Obviously, the completion of the transaction and the payment of the purchase price was a deliberate risk taken by appellants for the express purpose of reaping a greater reward through a claim against appellee on the policy. The consequences of this "change in circumstances" are more fully set out in the American Law Institute's Restatement of Restitution (§ 142 and comments (c), (d) and (e)):

> "§ 142. Change of Circumstances.
>
> "(1) The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.
>
> "(2) Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.
>
> "(3) Change of circumstances is not a defense if
>
> > "(a) the conduct of the recipient in obtaining, retaining or dealing with the subject matter was tortious, or
> >
> > "(b) the change occurred after the recipient had knowledge of the facts entitling the other to restitution and had an opportunity to make restitution."
>
> * * *
>
> "c. *Fault.* If the recipient has been fraudulent or guilty of duress not only is a defense of change of circumstances barred by the fact that his conduct was tortious but also because of his knowledge of facts from which he had notice of the right of the claimant to the subject matter.
>
> "If either the claimant or the recipient has failed to use care to ascertain relevant facts, such person is at fault within the meaning of this Section. Likewise, a misrepresentation by the recipient, even though innocent, constitutes fault and a change of

circumstances may not bar a claimant who has been guilty of no fault, if the misrepresentation caused the mistake (see the Caveat). If both parties have failed to exercise care, a change of circumstances such that the recipient would suffer loss, or would be likely to suffer loss, may be a bar unless his departure from the standard of care was substantially greater than that of the claimant (as to which see the Caveat).

"In determining whose fault is greater, the circumstances both preceding and subsequent to the transaction are considered. Thus, if, after the transaction but before the loss, either party becomes aware of facts from which, were he careful, he would ascertain that it was entered into under a basic mistake, such failure constitutes lack of due care and is to be considered in the determination of fault."

* * *

"d. *Tortious conduct*. Change of circumstances is not a defense to a person who, however innocently, has been guilty of tortious conduct in receiving, retaining or disposing of the subject matter."

* * *

"e. *Effect of knowledge*. If a person acquired property from another as the result of a mistake and has no reason to know facts which caused the transaction to be voidable, he has no duty with respect to the subject matter and is discharged from liability if, while he knows of no interest which the other has in the subject matter, the subject matter is destroyed. If, however, he subsequently learns facts from which he realizes the existence of a mistake, his failure to notify the other party prevents a subsequent change of circumstances from being a defense."

The fact that the rules of the Restatement of Restitution accord with the law of Oregon is indicated by the Oregon Supreme Court's approval of the text in many recent cases. Application of these rules to the facts here leads inevitably to the conclusion that to sustain the judgment all that was necessary was that the court find that appellants had knowledge of a substantial defect in the title and knowledge that the title company was issuing its policy under the erroneous belief that no such defect existed. It so found.

EVIDENCE OF OTHER PARKER-STEGMANN TRANSACTIONS

While one specification of error is devoted to the proposition that the court erred in admitting evidence of other transactions involving Parker and Stegmann, appellants implicitly recognize the flimsy character of this specification, inasmuch as the case was tried before the district court sitting without a jury. In fact, appellants have made no attempt in presenting this specification to comply with Rule 18(d) of the Rules of this court requiring that the grounds of objection and the substance of the testimony be quoted (App. Br. p. 9). This is reason enough for disregarding this specification.

Furthermore, it is familiar law that questions as to the admission of evidence "becomes relatively unimportant" in nonjury cases, "the rules of evidence relating to admission and exclusion of evidence being intended primarily for the purpose of withdrawing from the jury matter which might improperly sway the verdict, and not for the judge, who is presumed to act only on proper evidence." *MacDonnell v. Capital Co.,* 130 F. (2d) 311, (C.A. 9), cert. den. 317 U.S. 692, 63 S. Ct. 324, 87 L. Ed. 554 The rule was succintly stated recently in *Rolley, Inc v. Younghusband,* 204 F. (2d) 209, 212 (C.A.9):

> "Error in admission of evidence is harmless, where a case is tried to a court without a jury, if there is sufficient competent evidence to support the court's findings (Citing cases). This rule is grounded upon the presumption that a judge sitting without a jury will not be influenced by irrelevant evidence."

In the case at bar there is sufficient evidence to support the findings irrespective of the alleged erroneous evidence. However, the trial judge properly exercised his discretion in admitting the evidence objected to. The relationship between Parker and Stegmann was one of the basic issues in the case. Were Stegmann and Parker independent businessmen dealing at arm's length, or was Stegmann an agent and "front man" of Parker and a coconspirator in a scheme to defraud? (R. 433-4) Certainly, evidence of other transactions in which Stegmann had acted for Parker, either directly or indirectly, was relevant and proper on this issue. It is well settled in Oregon that an agency may be shown by circumstantial evidence and by a course of dealing, *Co-operative Copper & Gold Mining Co. v. Law,* 65 Or. 250, 132 P. 521; *Boise-Payette Lumber Co. v. Dominican Sisters, etc.,* 102 Or. 314, 202 P. 554; *Held v. Puget Sound & Alaska Powder Co.,* 135 Or. 283, 295 P. 969; *Young v. Neill,* 190 Or. 161, 174, 220 P. (2d) 89.

The evidence as to previous transactions was also admissible with respect to the question of the Parkers' and Stegmann's purpose and intent, in view of the fraudulent scheme charged in the amended complaint. An oft-cited opinion on this subject is *Wood v. United States,* 16 Pet. 342, 41 U.S. 342, 10 L. Ed. 987, where Mr. Justice Story wrote (p. 360):

> "The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act, directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

This rule has been followed in this court in *Jones v. United States,* 265 Fed. 235, 241, aff'd 258 U.S. 40, 42 S. Ct. 218, 66 L. Ed. 453; *Kettenbach v. United States,* 202 Fed. 377; *Himmelfarb v. United States,* 175 F. (2d) 924.

Even where the action is tried by a jury, much latitude is given to the trial court in conspiracy cases. In *Clune v. United States,* 159 U.S. 590, 592, 16 S. Ct. 125, 40 L. Ed. 269, Mr. Justice Shaw said:

> "Where it is sought to establish a conspiracy by circumstantial evidence, much discretion is left to the trial court in its rulings on the admissibility of evi-

> dence, and its rulings will be sustained, if the testimony which is admitted tends even remotely to establish the ultimate fact."

Other cases on the point are *Wood v. United States,* 84 F. (2d) 749 (C.A.5); *Phelps v. United States,* 160 F. (2d) 858, 973 (C.A.8) and *United States v. Schneiderman,* 106 F. Supp. 892, 902 (S.D.Cal. Mathes J).

Sufficiency of Proof of Fraudulent Scheme

A large portion of appellant's brief is devoted to discussion of specific items of evidence and an effort to show that the trial court was wrong in finding that there was a scheme to defraud, or that any overt acts were performed pursuant thereto. In substance these present nothing more than an argument that the trial court should have believed appellants instead of the other witnesses.

The contentions cover a varied field including argument why the court should have believed appellants rather than the forest rangers and Winans concerning meetings on August 13 and August 18 (pages 46-48); argument that their misrepresentation as to the amount they had paid for the property was not motivated by fraud because it did not induce the title company to miss the defect and because they could easily have increased their fraudulent gain from $25,000 to $80,000, or perhaps even more (pp 49-51); that the concealment from Winans of Parker's interest in the matter was not illegal, from which the inference is drawn that it could not have been the instrument of fraud (p. 53); that there were bigger and better ways in which appellants could have consummated their fraud (pp. 55-57), and hence that they must not have had fraudulent intent; and that appellants' "skulduggery" for a long time prior to August 16, 1951, necessarily proves that they couldn't have formed a plan to defraud on that date (p. 57).

We shall discuss only a few of these matters specifically. The argument whether Parker was present at a meeting with Stegmann and Paul Winans on August 18, when the option was exercised, was a crucial incident in the dispute between Winans and appellants. Appellants contended that on this occasion Parker informed Winans that he was buying the property and that from then on Winans would be dealing with him as to everything except the survey of the reserved area. Winans denied that Parker was even present at the meeting, insisted that he had not even met Parker until the latter was introduced to him as a surveyor on August 27, and that he did not know of Parker's interest in the property until after the deed had been recorded. The subject matter of the testimony was such that neither could have been mistaken and one side or the other gave perjured testimony. The court chose to believe Winans and his corroborating witnesses.

Appellants now argue that Parker had no motive to claim that he was at the meeting but, on the contrary, if he had an intent to deceive, it would have better served his interest to deny that he was at the meeting and therefore could not have learned of the flaw in the title. If this were a valid argument, it would be offset by the counter argument that in such case Winans' interest would have been best served by claiming that Parker had been at the meeting and had been told of the title defect.

The truth of the matter is that by the time Parker testified he realized that he might be chargeable as undisclosed principal with the revelations of Winans concerning the title flaw to his agent, Stegmann. To avoid this he must put Winans on notice of his interest. He could not remove Stegmann entirely from the picture, for Stegmann had handled the survey and the closing of the transaction. The next best thing was to put Winans on notice that the Stegmann agency was limited strictly to surveying the reserved area and the preparation of closing papers. In so testifying he repudiated his previous story that he had seen Winans only once, on a survey trip on August 27 (R. 1771, 1804).

It is next urged that since purchase price is only one evidence of value, there could have been no fraudulent purpose in misrepresenting the amount paid for the property and the value of each lot. Whatever the rule of law, the effectiveness of the misrepresentations is attested to by the fact that they induced appellee to offer payment of $90,000 for the loss on Lot 2, with Parkers retaining Lot 1 (R. 1903); and, when this was rejected, to offer $120,300 (their total claimed investment) for the entire loss (R. 1910).

The suggestion of frivolity in the trial court's finding that the conspiracy was furthered by the appellants' concealment from Winans of Parkers' interest and the fact that they were obtaining title insurance ignores one important factor: The tendency of Paul Winans to tell anyone and everyone who would listen about the defect in title to Lot 2 and his previous collection of damages from another title company.

Counsel for appellants question that they would have paid nearly $100,000 for a chance to collect a tax-free profit of $25,000 and suggest many things that they would or would not have done if they planned to defraud. No doubt hindsight will suggest many refinements and improvements in most fraudulent schemes. But we should not be overly critical. The fact remains that with all of its alleged deficiencies the plan was good enough that the Parkers could have accepted the settlement, pocketed their profits and laughed at the discomfiture of appellee when it discovered that it had sued the wrong people. Perhaps their failure to do so was their only serious mistake.

Of course no one but appellants can say with certainty why they did or did not do certain things. We suggest the following, however, as a plausible explanation of the questions posed by counsel:

While appellants knew full well of the fatal flaw in the title, they could not be certain prior to receipt of the title report, that appellee would fail to find the flaw. Perhaps they assumed that it would find the defect, although they had good reason to believe that it might not when, on August 13, the title company informed them that there was a policy already outstanding on the property and that its maps showed title to be in Winans (R. 233, 194, 200). But whatever their expectations, it is pointless to argue that they would not have contemplated investing $100,000 on the chance that appellee would miss the defect (App. Br. p. 55), or that they would have ordered title insurance in a large amount instead of a mere title report (App. Br. p. 55), for they had no intention of investing any such amount, or even of paying the cost of title insurance, on a mere gamble. If they expected the title company to find the flaw, it means only that their plan at that time was something different from the form which it finally assumed.

Perhaps it is idle to speculate on what the plan may have been prior to August 16. But since counsel seem to feel that there is something inconsistent in appellants' actions prior to August 16, and the conspiracy found to exist after that date, we shall consider the matter briefly.

Appellants had what appeared to be a valid and enforceable contract to purchase lands, the title to which they knew was defective. If the title report should disclose the defective title, the Parkers, in the guise of innocent purchasers of the option could present Winans with a substantial claim for damages. If they could negotiate a quick sale, they could add loss of profit to their damage claim. The evidence in this case leaves no room to doubt that they were fully capable of such deception. The fiction of Stegmann as an independent middleman was, of course, essential to the success of such a plan. If, as appellants insist, the assignment of option and the $25,000 check were executed on the date they bear—August 13—then these spurious documents were obviously designed for just such a fraudulent purpose.

If this were the original plan, the receipt of the title report showing marketable title required some rearrangement which could not be done in a day. Before the title company could be substituted as the intended victim, the option must be converted to a contract to purchase by paying the $4,000 due on or before August 18, and agreement must be reached with Winans on the reserve area. This relatively small additional payment could be made without risk for there was ample security in Lot 1. But what was necessary to assure recourse against the title company when the flaw came to light?

Having bought and sold some fifty tracts of timber, on half of which they had obtained title insurance (R. 273, 275), they knew, of course, that they could protect themselves with an owner's policy at the time they paid the balance of $95,000 on the purchase price. They were prepared to make this payment, having on August 9 earmarked $100,000 in a special bank account under the assumed business name of Phillips Construction Company (R. 419). However, on August 29 they learned, whether by design or accident is unimportant, that they could obtain a purchaser's policy.

This type of policy would have had little value to a bona fide purchaser who contemplated, as they did, paying cash and obtaining an owner's policy when the deal was closed. It was of considerable value, however, to appellants. It assured them of recourse against the title company if the talkative Winans should reveal the flaw before the deal was closed, not only for the sums they had paid Winans and the fictitious $25,000 to Stegmann, but for damages that they could claim through loss of a sale to Multnomah Plywood Corporation. They therefore wasted no time in obtaining the purchaser's policy.

The attempt to negotiate a fast sale for $180,000, perhaps designed originally to prove damages when the title defect appeared, lost none of its attractiveness when the title report was received. If the sale could be made, so much the better. Multnomah Plywood would, of course, obtain a title policy for $180,000 which would eventually assure their profit. No doubt they would have preferred a fast sale for cash, as their counsel suggest, but Multnomah Plywood didn't have the cash. Appellants offer to it, however, would have restored to them more than their entire investment, $100,000, before logging commenced (R. 1422, 1423). They insisted on this, for they knew that the Government would sue when the first tree was cut (R. 1050, 1068). After that they could afford to wait for their profit when settlement was made on the title policy.

It is thus seen that what was done prior to August 16 involves no inconsistency with the fraudulent scheme formed after that date. It is not the title company but appellants who are faced with the dilemma, for they cannot escape the fraud inherent in the spurious assignment of option and the fake $25,000 payment. Whenever and for what purpose these instruments were executed, they could lose none of their effectiveness as instruments of fraud by the substitution of one intended victim for another.

The charge of inconsistency stems from the unwarranted assumption that this was the only fraud perpetrated by the appellants and, therefore, that all conduct must be related to the particular scheme. To the contrary, efforts during the trial to investigate the relationship existing between the Parkers and Stegmann and the devious financial transactions between them brought to light many other instances of fraudulent conduct. One of these involved use of the same fictitious loan arrangements which appellants rely on here and, perhaps, therefore deserves some comment.

In May of 1951 a tract of timber known as the Johnson tract was purchased by Stegmann and paid for by means of personal checks charged to Parkers' bank account (R. 413, 414). A few days later it was sold by Stegmann to McCormick Lumber Company for a profit under a contract drawn by the Parkers (R. 666, 766; Ex. 29). The check for the purchase price payable to Stegmann, was endorsed and delivered to the Parkers, who credited the profit as a payment on the fictitious $22,000 loan (R. 667-670; Ex. 35, 36; R. 2097, 2104). The apparent income thus received was no problem to the insolvent Stegmann. The Parkers (in an eighty percent tax bracket), treated the profit as a nontaxable return of capital and reported only a small interest payment (Ex. 49; R. 2124). Even when this sham was exposed at the trial the Parkers insisted that they had had no interest in the Johnson timber.

The foregoing suffices to show the basic fallacy in appellants' treatment of the evidence upon which the trial court found the conspiracy to defraud. It would unduly lengthen this brief to reply in detail to their argument that Parker and Stegmann should be believed and the disinterested rangers and surveyors disbelieved (App. Br. 46-48); or that a motive or reason expressed by Parker or Stegmann in their testimony must be accepted as a fact for the purpose of their appeal (App. Br. 50, 54); or to point out again in detail that the sham assignment with the segregated values is not claimed to have caused the title company to refrain from a search (App. Br. 51, 52), the search having already been completed and these being merely cogs in the scheme to reap a profit.

BREACH OF POLICY CONDITION

The insuring agreement of the purchaser's policy of insurance contained the following provisions:

> "Any loss under this policy is to be established in the manner provided in said conditions and shall be paid upon compliance by the Insured with and as prescribed in said conditions, and not otherwise." (R. 35)

One of the conditions contained in that policy was:

> "Upon receipt of notice of any defect, lien or incumbrance hereby insured against, the Insured shall forthwith notify the Company thereof in writing." (R. 37)

The owner's policy contained identical provisions (R. 42, 45).

The trial court found that the Parkers knew of a substantial defect in the title to Lot 2 at the time of issuance of the purchaser's policy and that the failure of the Parkers to notify the title company between September 4, 1951, upon which date the policy was delivered, and prior to September 11, 1951, upon which date the final net payment of $90,250.00 on the purchase price was made, was unreasonable and materially prejudicial to the title company, and constituted a breach of the above quoted policy condition (R. 140).

Appellants seek to escape this policy condition by devious and diverse routes. The first ground of attack is not entirely clear. Their quotation from the case of *Overholtzer v. Northern Counties Title Insurance Company,* 116 Cal. App. (2d) 113, 253 P. (2d) 116, seems to imply a contention either that the policy provision above mentioned is qualified by some other clause in the policy, or else that it should not be enforced according to its plain terms. They have not, however, directed attention to any other policy provision and the *Overholtzer* case gives no support to their contention.

In the *Overholtzer* case the question involved was whether the insured, upon learning of the existence of a pipeline across his property, could reasonably rely on the title insurance policy in concluding that it was not there by virtue of an easement. Contrary to the statement on page 58 of appellant's brief, the insured had not learned from a neighbor that he had an easement over the insured's property. The court was careful to point out that while the neighbor had told him about a pipeline across the property, he did not then know that the pipeline existed by reason of the grant of an easement and was reasonably induced by the title policy to believe that the pipeline was maintained under a mere license.

The language of the court quoted from the *Overholtzer* opinion on page 58 of appellant's brief related to certain technical defenses raised by the title company. It did not, as appellants imply, relate to whether the insured had breached the contract by failing to notify the title company of the claimed easement, for the finding was that the insured had not learned of the easement.

In contrast to the *Overholtzer* case, the finding of fact here was that appellants did know of the defect in the title and were not acting in good faith.

This case is analogous to that of *Title Insurance Co. of Richmond v. Industrial Bank* (Va.), 157 S.E. 710. In that case the insurance policy covered the interest of the mortgagor under a trust deed and the policy failed to except certain street assessment liens against the property. The plaintiff and insured under the policy had foreclosed the trust deed and acquired the property at foreclosure sale. In connection with his acquisition of title to the property, he received information that there were some street assessments against it. He did not know whether or not the assessments antedated the policy and promptly endeavored to ascertain the dates of the assessments and as soon as he discovered that they were in effect at the time of issuance of the policy, he advised the title company of that fact.

The trial court instructed the jury that the plaintiff had a duty when he learned of the assessments to investigate with reasonable care to ascertain the dates and if found to be prior to the issuance of the policy, that he had a duty to at once advise the Company; and that if the plaintiff had failed to do so, the Company was not liable. It was held that the question of whether or not there had been a breach of the notice provision of the policy was properly submitted to the jury as a question of fact.

The enforceability of the policy provision in this case is not open to question in Oregon. Under the law of this state the parties to an insurance contract have the right to impose any conditions to liability which they desire, even though the conditions may be harsh or onerous. In the case of *Barmeier v. Oregon Physicians' Service,* 194 Or. 659, 671, 243 P. (2d) 1053, the Oregon Supreme Court said:

> "Courts cannot ignore such conditions for to do so would be to make a new contract for the parties."

Consistent with this general rule, the Oregon Supreme Court holds that compliance by the insured with a policy provision requiring prompt notice of an event insured against is a *condition precedent* to liability of the insurer; and that failure of the insured to comply with such a condition will preclude recovery on the policy even where breach of the condition has not been prejudicial to the insurer. *Hoffman v. Employers Liability Assurance Corporation*, 146 Or. 66, 29 P. (2d) 557.

Apparently appellants do not contend that the law is otherwise, although their summary of the *Hoffman* case on page 60 of their brief is quite misleading. The policy there involved was a general liability policy requiring the insured to give immediate notice to the insurer upon the occurrence of an accident covered by the policy. The insured's foreman received information that a woman had fallen over a barricade on a construction job, but was unable on subsequent inquiry to identify the woman or to ascertain whether she had suffered any injury. The insured's foreman made no report to his employer and consequently no notice was given to the insurance company, until action was filed by the injured party.

At the trial of the action on the insurance policy the insurance company called the foreman as its witness. The trial court concluded that the information which came to the foreman was so indefinite and uncertain in its nature as to constitute no notice to the assured that an accident covered by the policy had happened.

On appeal three of the Supreme Court Justices concluded that the question of whether there was sufficient evidence to excuse the delay in giving notice was one of fact and not of law; and, therefore, that the appellate court was bound by the trial court's finding on the question. The remaining two justices, while conceding that this was a question of fact, were of the opinion that the evidence was insufficient to excuse the failure to give notice of the accident. The opinion concludes that no useful purpose will be served by setting forth the testimony of the foreman and accordingly, it is impossible to weigh the merits of the opposing views thus expressed. The important point, however, is that the Supreme Court did not say that the holding of the trial court was required as a matter of law, or that a contrary holding would have been error. It is thus no authority for a case such as this where the trial court has reached a contrary conclusion.

Although the Supreme Court in the *Hoffman* case was not in agreement as to the sufficiency of the evidence to justify the finding, it was in complete agreement as to the legal principles applicable to policy conditions such as the one here involved. Concerning the nature of the condition requiring notice the Supreme Court said:

> "Although the question has not been heretofore passed upon by this court, yet it is well settled by the decisions in other jurisdictions that conditions endorsed upon an indemnity policy, such as condition D, must be fulfilled before the assured can become entitled to recover under the policy, and that it is not necessary for the policy to contain a provision of forfeiture where, as here, the language of the contract makes the giving of notice a condition precedent to liability on the part of the insurance company."

With respect to the claim that the insurer must show prejudice, the court said:

> "It being a condition precedent to liability, it must be performed before any liability on the other side can arise as the promise to pay the indemnity is made to depend upon the performance by plaintiff of the condition. Nonperformance of the condition prevents a recovery under the policy for the reason that until the condition has been performed plaintiff, has failed to perform his contract."

The court then quoted with approval the following language from another case:

> "But in our opinion it is wholly immaterial whether or not the appellee company was prejudiced by the

> unreasonable delay. If it could have been shown that it had been benefited this fact would not affect the question. A reasonable compliance with the conditions of the contract relating to notice is indispensable to fix liability."

Concerning the duty of the insured to give notice the court said:

> "The word 'immediate' in its reference to the notice it not to be taken literally but means with reasonable celerity, with reasonable and proper diligence, after a discovery of a ground of liability or after such a discovery should have been made. What is a reasonable time depends upon the circumstances of each particular case and, ordinarily, the question whether required notice has been given within a reasonable time is a question of fact for the jury, having due regard to the nature and circumstances of the case."

With further reference to the burden resting on the assured the court said:

> "Since, under this policy, the plaintiff had obligated himself to report immediately all accidents covered by the policy and had failed to make such report for more than one year after the happening of the accident, the burden of proving a reasonable excuse for such failure rested upon the plaintiff and not on the defendant. Upon receiving notice of the happening of an accident under a policy such as that involved here, the duty of investigating and determining whether an accident covered by the policy had happened was an active and not a passive duty upon the part of the plaintiff. He was chargeable with all the information he possessed and with all the information that he could have acquired by the exercise of reasonable diligence upon his part. Upon these and all other principles stated above, the court is in entire accord."

The applicability of the *Hoffman* case with the one at bar is readily apparent. The trial court found that the Parkers had notice of a substantial defect insured against under the policy and that their delay in reporting it to the title company was unreasonable. On this ground alone, therefore, the Parkers would be precluded from recovering on their counterclaim. The Oregon Supreme Court has similarly held in *Bennett v. Metropolitan Life Insurance Company,* 173 Or. 386, 145 P. (2d) 815, that the requirement of notice of accident or disability under life and accident and health policies is a condition precedent.

Although it was unnecessary to the decision, the trial court found that the failure to give notice was unreasonable and prejudicial and its finding in this regard was abundantly supported by the evidence. An additional $90,250 was paid after the issuance of the purchaser's policy, thereby increasing the possible loss thereunder. In addition, any subrogation rights which might be invoked by the title company were prejudiced by the possibility of merger by deed under the doctrine of the Oregon case, *City of Bend v. Title and Trust Company,* 134 Or. 119, 289 P. 1044, and by depriving it of the right to rescind the original option contract under the rule announced in such cases as *Booth Kelly Lumber Company v. Oregon R. R. Company,* 117 Or. 438, 243 P. 773; *Collins v. Delaschmutt,* 6 Or. 51, and the case of *Hall v. McKee* (Ky.), 145 S.W. 1129.

There can be no doubt that this was a contract to convey land which could have been rescinded when it became known that the Winans family could not convey title to the property. Notwithstanding appellants' reference to the option as a "cleverly worded document" and as containing a "clumsily disguised limitation of liability" (App. Br. pp. 14, 23), it was in fact an agreement to convey realty. The clause that conveyance should be by deed conveying the right, title and interest of the seller was merely descriptive of the form of deed and in no way detracted from the promise to sell the property itself. *Collins v. DeLashmutt,* 6 Or. 51; *Sheehan v. McKinstry,* 105 Or. 473, 210 P. 167; *Thorp v. Rutherford,* 150 Or. 157, 43 P. (2d) 907; *Henderson v. Beatty* (Iowa), 99 N.W. 716; *Maffet v. Oregon California Railroad Co.,* 46 Or. 443, 80 P. 489.

Appellants, however, do not attack the findings that their conceded failure to give notice was unreasonable and materially prejudicial to appellee. Instead, they contend, first, that the policy condition applies only to notice received *after* issuance of the policy, and accordingly, that they had no obligation to disclose information which they already had concerning the flaw in the title.

The mere statement of this argument shows its absurdity. Whatever may have been their duty in the absence of contract, here was an express requirement in the purchaser's policy that the insured communicate to the insurer any information which he might receive concerning a defect in title. The purpose of the requirement was obviously to afford an opportunity for prompt investigation of adverse claims, to the end that the loss be minimized or avoided if possible. Strict compliance with the condition was particularly important under the purchaser's policy, where every payment might aggrevate the loss. To draw a distinction between information received before and after issuance of the policy would be to ignore the obvious purpose of the provision and to give an absurd meaning to the language used.

This argument involves still another absurdity. Where recovery is allowed under title insurance policies, the damage is measured by the diminution in market value of the property *on the date when the insured learns of the defect in title. Overholtzer v. Northern Counties Title Insurance Company,* supra, and cases cited therein.

For this reason we think it obvious that even if appellants had been exonerated of fraud and had been held to be under no duty to reveal their prior knowledge of the defect in title, nevertheless liability could never exceed the damage which had accrued on September 4 when the purchaser's policy was issued. But aside from this, if appellant's present suggestion is adopted and knowledge existing at the time of issuance of a policy be discarded as unimportant, then as of what date will the damages be measured? Will appellants claim that an insured may defer his claim of loss indefinitely and thereby arrange for subsequent "discovery" of the defect at a time when market conditions will net the maximum recovery?

Other absurdities could be mentioned but the contention need not be decided here for the reason that there is an abundance of evidence of notice of the defect brought to the attention of the Parkers again and again after August 30, 1951, the effective date of the purchaser's policy. Appellant Chet Parker was advised in detail of the defect on August 31 (R. 293, 830, 833; F. 22; R. 129). Stegmann, as agent for his undisclosed principals, the Parkers, was advised in detail of the defect on September 8 in the presence of Vawter Parker, a respected member of the Oregon Bar, at which time Stegmann was requested to sign an acknowledgement that the title was subject to the Government's claim (R. 966, 980, 981, 2265; Ex. 311). On this occasion Stegmann refused to sign the acknowledgement on the ground that it wouuld amount to acknowledging that the title was no good (R. 841, 914, 1716, 1717). Even at the time of closing the deal attorney Kenneth Abraham, acting as attorney for his undisclosed principals, the Parkers, was notified of the title question. There was thus ample evidence of information received by appellants after the purchaser's policy became effective.

The next argument made by appellants is that they had only "vague and uncorroborated information" from "unauthorized sources" which did not rise to the dignity of "receipt of notice." The adjectives used by appellants are a most inaccurate description of the evidence which the trial court found to be true, namely: The Parkers knew that the United States claimed title to Lot 2; they knew that the basis of the claim was that there had not been an official Government survey prior to the deed from the State of Oregon; they knew that the property had been withdrawn from the public lands and included in the Bull Run Water Shed of the Mt. Hood National Forest; they knew that another title insurance company had paid $3,000 on account of the identical defect in title; they knew that an Act of Congress would be required to obtain title; they were advised by the grantor to leave the record title in the name of the Winans family until such private bill could be enacted; they were shown the plats of the United States Forest Service and advised that the title to the property was in question; they saw the signs on the property indicating that it was a part of the Mt. Hood National Forest; they even acknowledge some knowledge of the defect by suggesting to the forest rangers that the way to test the Government's claim would be to cut down a tree (R. 1050).

In addition to all of the foregoing evidence, which the trial court believed, the trial court was confronted by the fact that appellants had denied receiving such information and, therefore, necessarily had wilfully and knowingly given false testimony. The trial court was certainly entitled to take this factor into consideration in weighing the character and extent of the knowledge which appellants had concerning the title defect. We find it difficult to understand how counsel can characterize this information as vague, uncorroborated or from unauthorized sources. The trial court was certainly competent to analyze the nature of the information which appellants had and to make a finding of fact as to the reasonableness and good faith of their conduct in the light of such notice.

Appellants cite in support of this contention the *Hoffman* case, supra, which we have already discussed in some detail. As pointed out above, the *Hoffman* case in no way supports appellants' claim that the information here was insufficient as a matter of law to constitute notice of a title defect.

It is next contended that the breach of the condition of the purchaser's policy is irrelevant because the counterclaim is based on the owner's policy issued on September 14, and appellants repeat their argument that there was no duty on the part of the Parkers to pass on to appellee information that they may have obtained prior to the issuance of that policy.

It was stipulated in this case that Parker paid $25.00 for a title report on August 15 or 16 and later a balance of $405.00 as a premium for the purchaser's policy. On September 12, 1951, at the Parkers' request, and in accordance with their previous agreement (R. 176), appellee exchanged this for an owner's policy for no additional charge (R. 103-105). The owner's policy was issued after appellee had discovered the title defect in Lot 2 and in reliance upon the Parkers' good faith and their representation that they knew nothing of any claim of ownership by the United States (R. 139).

As testified to by one of the witnesses, this was all one transaction (R. 176). The complete contract between the parties as of September 4 included the following commitments:

1. Parkers would pay a premium of $430.00.

2. Title and Trust would issue a purchaser's policy in the amount of $125,000.00.

3. Upon fiinal payment of the purchase price this would be exchanged for an owner's policy without additional charge.

4. During the interim Parkers would forthwith notify the company of any defect insured against which came to their notice (R. 37).

We quote the following from 44 C.J.S., Sec. 299, p. 1200:

> "Contracts, although separate in form, agreed on as a part of the insurance transaction must be construed together for the purpose of determining the character of the insurance contract and the intention of the parties, even though they are not executed on the same day."

Any other construction here would render the owner's policy void for lack of consideration. Moreover, even if the two policies were construed as separate and distinct contracts, appellants' position would not be improved. For whatever the duty in the absence of contract, the purchaser's policy imposed a contractual duty on Parkers to disclose the defect and their failure to so do was a breach of that contract.

BRIEF OF APPELLEE TITLE AND TRUST COMPANY IN ANSWER TO APPELLANT WALTER STEGMANN

ARGUMENT

As alternatives to its causes of suit alleged against the appellants Parker the title company alleged two alternative causes of action against appellant Stegmann and one cause of action against appellant Stegmann for declaratory relief. The first alternative cause of action was based upon a theory of mutual mistake on the part of both Parker and Stegmann, thereby giving rise to a cause of action in the title company as subrogee to secure a proportionate abatement of the consideration paid Stegmann by Parker for the assignment of option (R. 16-18). Authority for such an action is found in the Oregon cases *Bartholomew v. Bason*, 188 Or. 550, 214 P. (2d) 352, and *Van Horn Construction Corp. v. Joy,* 186 Or. 473, 207 P. (2d) 157.

The second alternative cause of action stated against appellant Stegmann was based upon a theory of fraudulent concealment in the event that it were found that the Winans family had made a complete disclosure to Stegmann but that he had not made a disclosure to Parker (R. 18, 19). Authority for such an action is found in *Billups v. Colmer,* 118 Or. 192, 244 P. 1093, and 23 Am. Jur., Fraud and Deceit, Section 85.

Appellant Stegmann apparently concedes that each of these two counts state the requisites of a cause of action excepting only the question of the right of the title company to sue as subrogee prior to payment or tender of payment to appellants Parker.

The title company's cause of action against Stegmann for declaratory relief sets forth that the Parkers had demanded indemnity for their loss or damage in the total sum of $125,000, that the title company claimed a right to indemnity in whole or in part from Stegmann on account of any loss or damage for which it might be held liable to the Parkers and then sets forth a number of common disputed questions of fact and law in the controversy between the title company and Stegmann and Parkers, among the most important of which were the legal effect of the grant of the option and its exercise, whether Stegmann was acting on his own behalf or as agent for an undisclosed principal, whether there was any consideration paid by Parker to Stegmann for the assignment of option, whether Winans disclosed to Stegmann the facts relative to the defect in title and whether Stegmann disclosed to Parker the matters relative to said defect (R. 19-22).

It is at once apparent that if the controversy between the Parkers and the title company proceeded to trial and final decision alone in the absence of Stegmann as a party to the proceeding the interests of Stegmann with respect to any of the questions stated in the preceding paragraph would be affected by virtue of the application of the doctrine of *stare decisis* even though the determination in such event would not be *res judicata* as to him. Depending upon the determination the result might be either harmful or helpful to Stegmann's interests in any litigation between himself and the title company or Winans or the Parkers pertaining to his part in the transaction. Thus, Stegmann at the least was a proper party to the litigation if perhaps not an indispensable party.

That an insurer does not have to pay a claim in order to have a declaration as to its right of subrogation against another insurer and that a declaration is proper although liability of either insurer depended upon a contingency which had not yet happened was held in the case *Maryland Casualty Co. v. Hubbard,* 22 Fed. Sup. 697 (DC, SD, Cal.). The court further held that it is proper to join parties in a declaratory judgment proceeding whose interest might under certain contingencies be adverse to that of the plaintiff in the proceeding or whose present obligation to the plaintiff is merely potential and the court pointed out that community of interest in a question of fact or law is the test of joinder of proper parties in a declaratory judgment action. See also the case, *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 85 L. Ed. 826, where a similar conclusion was reached.

In *Franklin Life Insurance Co. v. Johnson,* 157 Fed. (2d) 653 (CCA 10), at page 658 of the report the court stated:

> "To hold a person whose interest is contingent may not be compelled to defend an action for a declaratory judgment would greatly diminish the field and lessen the utility of declaratory judgment actions. The purpose of the declaratory judgment action is to settle actual controversies before they

> have ripened into actual violations of law or legal duty or breach of contractual obligations."

The court went on to hold that a contingent beneficiary under a life insurance policy is at the least a proper party to a declaratory judgment action and the court stressed the importance of one determination of common questions of law and fact as to the legal relationships and rights under a policy of insurance.

The cases relied on by appellant Stegmann are not persuasive in the case at bar because:

Heller v. Shapiro, 208 Wis. 310, 242 N.W. 174, 87 A.L.R. 1201, involved an attempt to enjoin sale of property acquired by defendant under a mortgage foreclosure decree based upon an event which might occur in future.

State Mutual Life Assur. Co. v. Webster (C.A. 9), 148 F. (2d) 315, involved rendering an advisory opinion as to rights which had neither been asserted or denied by the interested parties.

Johnson v. Interstate Transit Lines, 163 F. (2d) 125, involved no actual controversy between the actual parties and a defect in parties who might have a justiciable controversy with plaintiff.

While it is true that the record of the case at bar is complicated and the trial was lengthy, nevertheless it is clear that the purpose of the declaratory judgment procedure has been fulfilled in that all matters arising out of subject transaction have been disposed of in one lawsuit without exposing any of the parties to the hazard of having some important issue determined in one manner in one case and in exactly the opposite manner in another, and by making it possible to bring before the court all material and relevant evidence bearing on the issues.

Regardless of the theories set forth in the pleadings, in the light of the trial court's findings that Stegmann was one of the conspirators to defraud the title company, it is absurd for him at this time to suggest that he was not a proper party defendant.

CONCLUSION

For the reasons stated the judgment of the trial court should be affirmed.

Respectfully submitted,

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